Supreme Court, U.S.
FILED
AUG 17 2006
OFFICE OF THE CLERK

No. 05-9264

IN THE

# Supreme Court of the United States

ALPHONSO JAMES, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## JOINT APPENDIX

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August 17, 2006

**PETITION FOR CERTIORARI FILED FEBRUARY 14, 2006**
**CERTIORARI GRANTED JUNE 12, 2006**

TABLE OF CONTENTS


| | Page |
|---|---|
| United States District Court, Middle District of Florida, Relevant Docket Entries | 1 |
| United States Court of Appeals for the Eleventh Circuit, Relevant Docket Entries | 11 |
| *United States* v. *James*, No. 2:03-cr-00072-FTM-29SPC (M.D. Fla. June 25, 2003) (indictment) | 14 |
| Trial Transcript, *United States* v. *James*, No. 2:03-cr-00072-FTM-29SPC (M.D. Fla. Apr. 19, 2004) (excerpted from pages 3-4, 10-11) | 18 |
| Trial Transcript, *United States* v. *James*, No. 2:03-cr-00072-FTM-29SPC (M.D. Fla. May 10, 2004) (sentencing proceedings) (excerpted from pages 4-21) | 21 |
| *United States* v. *James*, No. 2:03-cr-00072-FTM-29SPC (M.D. Fla. May 18, 2004) (amended judgment) | 35 |
| *United States* v. *James*, 430 F.3d 1150 (11th Cir. 2005) | 44 |
| *United States* v. *James*, No. 2:03-cr-00072-FTM-29SPC (M.D. Fla. Mar. 28, 2006) (judgment on remand) | 55 |

U.S. DISTRICT COURT
Middle District of Florida (Ft. Myers)

[Date Filed 06/25/2003]

CRIMINAL DOCKET FOR CASE #: 2:03-cr-00072-JES-ALL

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

ALPHONSO JAMES JR.,
*Defendant.*

**DOCKET ENTRIES**

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | * * * * |
| 06/25/2003 | 1 | INDICTMENT as to Alphonso James (1) count(s) 1 (lap) (Entered: 06/26/2003) |
| | | * * * * |
| 06/27/2003 | 3 | INITIAL APPEARANCE held on 06/27/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr. Tape: 03-3SPC Defendant(s) informed of rights. (lap) (Entered: 06/27/2003) |
| | | * * * * |
| 07/01/2003 | 8 | DETENTION HEARING held on 07/01/03 before Magistrate Judge Douglas N. Frazier as to Alphonso James Jr. Court Reporter: Brenda Alexander (lap) (Entered: 07/02/2003) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 07/01/2003 | 8 | ARRAIGNMENT held on 07/01/03 as to Alphonso James Jr.. Defendant(s) pled not guilty before Magistrate Judge Douglas N. Frazier Court Reporter: Brenda Alexander (lap) (Entered: 07/02/2003) |
| | | * * * * |
| 07/23/2003 | 14 | STATUS CONFERENCE held on 07/21/03 before Judge John E. Steele as to Alphonso James Jr. Court Reporter: Brenda Alexander (lap) (Entered: 07/23/2003) |
| | | * * * * |
| 08/15/2003 | 17 | MOTION with memorandum in support by Alphonso James Jr. to suppress evidence Referred to Magistrate Judge Sheri P. Chappell (sll) (Entered: 08/18/2003) |
| | | * * * * |
| 08/25/2003 | 21 | RESPONSE by USA as to Alphonso James Jr. in opposition to [17-1] motion to suppress evidence (sll) (Entered: 08/25/2003) |
| | | * * * * |
| 10/06/2003 | 28 | STATUS CONFERENCE held on 10/6/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr., setting status conference for 10/28/03 @ 9:00 scheduled for Magistrate Judge Sheri P. Chappell Court Reporter: NMRS-Patsy Coleman (sll) (Entered: 10/06/2003) |
| | | * * * * |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/21/2003 | 31 | STATUS CONFERENCE held on 10/20/03 before Judge John E. Steele as to Alphonso James Jr. Court Reporter: Brenda Alexander (sll) (Entered: 10/21/2003) |
| | | * * * * |
| 10/28/2003 | 33 | STATUS CONFERENCE held on 10/28/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr. Court Reporter: NMRS-Patsy Coleman (sll) (Entered: 10/28/2003) |
| | | * * * * |
| 11/25/2003 | 36 | STATUS CONFERENCE held on 11/25/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr. Court Reporter: NMRS-Patsy Coleman (sll) (Entered: 11/25/2003) |
| | | * * * * |
| 12/11/2003 | 43 | EVIDENTIARY HEARING held on 12/11/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr. Court Reporter: NMRS-Liz Barnes (sll) (Entered: 12/11/2003) |
| 12/11/2003 | 44 | EXHIBIT LIST by Alphonso James Jr. as to Alphonso James Jr. (sll) (Entered: 12/11/2003) |
| 12/11/2003 | 45 | EXHIBIT LIST by USA as to Alphonso James Jr. (sll) (Entered: 12/11/2003) |
| | | * * * * |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 12/12/2003 | 47 | TRANSCRIPT as to Alphonso James Jr. of evidentiary hearing held on 12/11/03 before Judge Sheri Polster Chappell. Transcript filed separately. (sll) (Entered: 12/12/2003) |
| 12/18/2003 | 48 | REPORT AND RECOMMENDATIONS of Magistrate Judge Sheri P. Chappell recommending denial as to Alphonso James Jr. Re: [17-1] motion to suppress evidence; Motion no longer referred ctc Objections to R and R due by 1/12/04 (sll) (Entered: 12/18/2003) |
| | | * * * * |
| 12/23/2003 | 51 | OBJECTION by Alphonso James Jr. to [48-1] report and recommendations Response to objections to R and R due by 1/13/04 (sll) (Entered: 12/24/2003) |
| | | * * * * |
| 12/30/2003 | 53 | ORDER denying [17-1] motion to suppress evidence and adopting [48-1] report and recommendations as to Alphonso James (1) (Signed by Judge John E. Steele ) ctc (kma) (Entered: 12/31/2003) |
| 01/08/2004 | 56 | NOTICE regarding plea of guilty furnished to Counsel as to Alphonso James Jr. (drn) (Entered: 01/14/2004) |
| 01/08/2004 | 57 | CONSENT to court's inspection of PSI report prior to plea of guilty or finding of guilt by Alphonso James Jr. (drn) (Entered: 01/14/2004) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 01/08/2004 | 58 | WAIVER of Objection to Report & Recommendation by Alphonso James Jr. (drn) (Entered: 01/14/2004) |
| 01/09/2004 | 54 | NOTICE of maximum penalty, elements of offense, personalization of elements and factual basis by USA as to Alphonso James Jr. (lap) (Entered: 01/09/2004) |
| | | * * * * |
| 01/13/2004 | 59 | CHANGE OF PLEA HEARING held before Magistrate Judge Douglas N. Frazier, guilty plea proffered as to Alphonso James (1) count(s) 1 Court Reporter: NMRS-Patsy Coleman. (drn) (Entered: 01/14/2004) |
| 01/13/2004 | 60 | REPORT AND RECOMMENDATION concerning plea of guilty as to Alphonso James Jr. (Signed by Magistrate Judge Douglas N. Frazier) ctc (drn) (Entered: 01/14/2004) |
| 01/15/2004 | 61 | ACCEPTANCE OF PLEA of guilty and adjudication of guilt as to Alphonso James Jr. (1) count(s) 1 Sentencing set for 10:30 4/19/04 for Alphonso James Jr. Scheduled for Judge John Steele (Signed by Judge John E. Steele) ctc (drn) (Entered: 01/15/2004) |
| | | * * * * |
| 04/19/2004 | 63 | MINUTE ENTRY Sentencing continued to 05/10/04 as to Alphonso James Jr. held on 04/19/04 before Judge John E. Steele Court Reporter: Brenda Alexander (lap) (Entered: 04/20/2004) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 05/10/2004 | 64 | SENTENCING held on 05/10/04 before Judge John E. Steele, as to Alphonso James (1) count(s) 1. Imprisonment: 71 months; Supervised Release: 36 months; Special Assessment: $100.00 (JES-05/10/04) Court Reporter: NMRS-Patsy Coleman (lap) (Entered: 05/11/2004) |
| 05/11/2004 | 65 | JUDGMENT as to Alphonso James Jr. (Signed by Judge John E. Steele) ctc (lap) (Entered: 05/11/2004) |
| 05/18/2004 | 66 | AMENDED JUDGMENT: as to Alphonso James Jr. (1) count(s) 1. Imprisonment: 71 months; Supervised Release: 36 months; Special Assessment: $100.00 (JES-05/10/04) AMENDED: 500 Hour Drug Treatment Program (JES-5/18/04) (Signed by Judge John E. Steele) ctc (sll) (Entered: 05/19/2004) |
| 05/28/2004 | 67 | TRANSCRIPT as to Alphonso James Jr. of sentencing held on 4/19/04 before Judge John E. Steele. Transcript filed separately. (sll) (Entered: 06/03/2004) |
| 06/07/2004 | 68 | TRANSCRIPT as to Alphonso James Jr. of Sentencing held on 05/10/4 before Judge John E. Steele. Transcript filed separately. (kma) (Entered: 06/08/2004) |
| 06/07/2004 | 69 | NOTICE OF APPEAL by USA re: [65-1] judgment order and [66-1] judgment order as to Alphonso James (1) count(s) 1 Transcript information form due on 6/21/04 for Alphonso James Jr. ctc (kma) (Entered: 06/08/2004) |

* * * *

06/10/2004 70 NOTICE OF APPEAL re: [65-1] judgment order by, [66-1] judgment order by Alphonso James (1) count(s) 1 Filing fee $ Federal Public Defender Appointed Transcript information form due on 6/24/04 for Alphonso James Jr. ctc (sll) (Entered: 06/10/2004)

* * * *

06/17/2004 NOTICE assigning 11th Circuit case number re: [69-1] appeal USCA #: 04-12915C (kma) (Entered: 06/29/2004)

06/18/2004 71 RETURN of judgment executed as to Alphonso James Jr. on 6/4/04 at FCC Coleman-Low (sll) (Entered: 06/18/2004)

06/18/2004 72 RETURN of judgment executed as to Alphonso James Jr. on 6/4/04 at FCC Coleman-Low (sll) (Entered: 06/18/2004)

* * * *

08/23/2004 80 TRANSCRIPT filed Initial Appearance for dates of 06/27/03 before Judge Sheri Polster Chappell, re 70 Notice of appeal and 69 Notice of appeal Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/25/2004)

08/23/2004 81 TRANSCRIPT filed Status Conference for dates of 10/06/03 before Judge Sheri Polster Chappell re 70 Notice of appeal and 69 Notice of appeal. Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/25/2004)

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 08/23/2004 | 82 | TRANSCRIPT filed status conference for dates of 10/28/2003 before Judge Sheri Polster Chappell re 70 Notice of appeal and 69 Notice of appeal Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/26/2004) |
| 08/23/2004 | 83 | TRANSCRIPT filed status conference regarding motion to suppress for date of 11/25/2003 before Judge Sheri Polster Chappell re 70 Notice of appeal and 69 Notice of appeal Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/26/2004) |
| 08/23/2004 | 84 | TRANSCRIPT filed change of plea for dates of 01/13/2004 before Judge Douglas N. Frazier, re 70 Notice of appeal and 69 Notice of appeal Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/26/2004) |
| 10/04/2004 | 85 | TRANSCRIPT filed arraignment and detention hearing for dates of 07/01/03 before Judge Douglas N. Frazier, re 70 Notice of appeal Court Reporter: Brenda Alexander. as to Alphonso James Jr. (kma) (Entered: 10/14/2004) |
| 10/04/2004 | 86 | TRANSCRIPT filed status conference for dates of 07/21/03 before Judge John E. Steele, re 70 Notice of appeal Court Reporter: Brenda Alexander, as to Alphonso James Jr. (kma) (Entered: 10/14/2004) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/04/2004 | 87 | TRANSCRIPT filed status conference for dates of 10/20/03 before Judge John E. Steele, re 70 Notice of appeal Court Reporter: Brenda Alexander, as to Alphonso James Jr. (kma) (Entered: 10/14/2004) |
| | | * * * * |
| 12/06/2004 | | PSI received from U.S. Probation for the purpose of appeal as to defendant Alphonso James Jr. (slp) (Entered: 12/09/2004) |
| | | * * * * |
| 12/20/2005 | 90 | JUDGMENT of USCA (certified copy) vacating and remanding the decision of the District Court as to Alphonso James, Jr re 69 Notice of appeal and 70 Notice of appeal. EOD: 11/17/05. USCA number: 04-12915. Issued as mandate: 12/16/05. (kma) (Entered: 12/22/2005) |
| | | * * * * |
| 03/24/2006 | 92 | MOTION to continue *RE-SENTENCING* by Alphonso James, Jr. (Der Ovanesian, Martin) (Entered: 03/24/2006) |
| 03/24/2006 | 93 | RESPONSE in opposition by United States of America as to Alphonso James, Jr re 92 Motion to continue *Resentencing* (Michelland, Jeffrey) (Entered: 03/24/2006) |
| 03/24/2006 | 94 | ORDER denying 92 Motion to continue as to Alphonso James Jr. (1). Signed by Judge John E. Steele on 3/24/2006. (RKM) (Entered: 03/24/2006) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 03/27/2006 | 95 | Minute Entry for proceedings held before Judge John E. Steele :SENTENCING UPON REMAND held on 3/27/2006 for Alphonso James, Jr. (1), Count 1, Imprisonment: 180 months; Supervised Release: 5 years; Special Assessment: $100.00 (previously paid); 500 Hour Drug Treatment Program. Court Reporter: Jeffrey G. Thomas. (BMA) (Entered: 03/27/2006) |
| 03/28/2006 | 96 | JUDGMENT UPON REMAND as to Alphonso James, Jr. (1), Count 1, Imprisonment: 180 months; Supervised Release: 5 years; Special Assessment: $100.00 (if not previously paid); 500 Hour Drug Treatment Program. Signed by Judge John E. Steele on 3/28/2006. (BMA) (Entered: 03/28/2006) |
| 03/30/2006 | 97 | NOTICE OF APPEAL by Alphonso James, Jr re 96 Judgment, Filing fee not paid. (DerOvanesian, Martin) (Entered: 03/03/2006) |
| | | * * * * |
| 04/27/2006 | 102 | TRANSCRIPT of Sentencing on Remand for the date of 03/27/2006 held before Judge John E. Steele, re: 97 Notice of appeal as to Alphonso James, Jr. Court Reporter: Jeffrey G. Thomas (slp) (Entered: 04/27/2006) |

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, GA 30303-2289
(404) 335-6100

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04-12915-CC

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UNITED STATES OF AMERICA,
*Plaintiff-Appellant-Cross-Appellee,*

versus

ALPHONSO JAMES, JR.,
*Defendant-Appellee-Cross-Appellant.*

---

**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| | * * * * |
| 06/15/2004 | Probable Jurisdiction Noted: Party: United States of America. Pending: No |
| | * * * * |
| 08/23/2004 | Transcript Filed in D.C. (10/6/03, 10/28/03, 11/25/03, 1/13/04, 6/27/03 – 5 volumes). Pending: No |
| 08/24/2004 | E-Brief Tendered: Appellant by Karin B. Hoppmann for United States of America. Party: United States of America. Pending: No |

| DATE | PROCEEDINGS |
|---|---|
| 08/25/2004 | Appellant Brief Filed: (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No |
| 08/25/2004 | Record Excerpts: (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No |
| | * * * * |
| 10/27/2004 | E-Brief Tendered: Appellee by Craig L. Crawford for Alphonso Jr. James (33689-018). Party: Alphonso Jr. James. Pending: No |
| 10/29/2004 | Appellee/Cross Appellant Brief Filed: (Atty: Craig L. Crawford) Party: Alphonso Jr. James. Pending: No |
| 10/29/2004 | Record Excerpts: (Atty: Craig L. Crawford) Party: Alphonso Jr. James. Pending: No |
| | * * * * |
| 01/13/2005 | E-Brief Tendered: Appellant by Karin B. Hoppmann for United States of America. Party: United States of America. Pending: No |
| 01/14/2005 | Cross-Appellee Brief Filed: M1/18 PT'D (COC incorrect) (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No |
| | * * * * |
| 01/18/2005 | Supplemental Authority for Appellant: (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No |
| | * * * * |
| 09/15/2005 | Oral Argument Scheduled: 09/15/05. Pending: No |

| DATE | PROCEEDINGS |
|---|---|
| 09/15/2005 | Supplemental Authority for Appellant: (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No |
| 09/19/2005 | Karin B. Hoppmann argued for Appellant; Craig L. Crawford argued for Appellee. Pending: No |
| 11/17/2005 | Judgment Entered. Pending: No |
| 11/17/2005 | OPIN1 (Notice of issuance of opinion) issued. c:Crawford, Craig L.; c:Derovanesian, Martin; c:Hoppmann, Karin B.; c:Michelland, Jeffrey F.; c:Peacock, R. Fletcher, c:Steele, John E. Pending: No |
| 11/17/2005 | Opinion Issued-04-12990X-VACATED AND REMANDED. Pending: No |
| | * * * * |
| 12/16/2005 | CASE CLOSED-Mandate Issued. Pending: No |
| 12/16/2005 | Mandate Issued. Pending: No |
| | * * * * |
| 02/24/2006 | Notice of Filing Certiorari: SC# 05-9264. Party: Alphonso Jr. James. Pending: Yes |
| 06/20/2006 | Certiorari Granted S Ct # 05-9264: (Granted as to Question 2 and ifp) (Atty: Craig L. Crawford). Party: Alphonso Jr. James. Pending: No |

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed JUN 25, 2003]

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CASE NO. 2:03-cr-72-FtM-29SPC

---

UNITED STATES OF AMERICA,

v.

ALPHONSO JAMES, JR.,

---

*INDICTMENT*

The Grand Jury charges that:

*COUNT ONE*

On or about January 31, 2003, at Fort Myers, in Lee County, in the Middle District of Florida,

ALPHONSO JAMES, JR.,

defendant herein, then being a person convicted of a crime punishable by imprisonment for a term exceeding one year, namely:

(a) *Attempted Burglary of a Dwelling*, in violation of Florida Statutes, Sections 810.02 and 777.04, a crime punishable by imprisonment for a term exceeding one year, in the Circuit Court, Twentieth Judicial Circuit, in and for Lee County, Florida, in *State of Florida vs. Alphonso James*, Case No. 94-2197CF, on June 3, 1997;

(b) *Possession of a Cocaine*, in violation of Florida Statutes, Section 893.13, and *Trafficking in Illegal Drugs*, in violation of Florida Statutes, Section 893.135, crimes punishable by imprisonment for a term exceeding one year, in the Circuit Court, Twentieth Judicial Circuit, in

and for Lee County, Florida, in *State of Florida vs. Alphonso James, Jr.*, Case No. 96-3132CF, on January 28, 1998: and

(c) *Trafficking in Cocaine*, in violation of Florida Statutes, Section 893.135, a crime punishable by imprisonment for a term exceeding one year, in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, in *State of Florida vs. Alphonso James*, Case No. 97-11458CF, on June 29, 1998,

did knowingly possess in and affecting commerce a firearm, namely, an F.E.G., Model Mark II APK, .380 caliber semi-automatic pistol, serial number AK01866, and Remington .380 caliber ammunition.

In violation of Title 18, United States Code, Section 922(g)(1) and Section 924(e).

*FORFEITURE*

The allegations contained in Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461.

From his engagement in any or all of the violations alleged in Count One of this Indictment, defendant ALPHONSO JAMES, JR. shalt forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461, all of his right, title and interest in:

Any firearm or ammunition involved in or used in any knowing violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2), to include an F.E.G., Model Mark II APK, .380 caliber semi-automatic pistol, serial number AK01866, and Remington .380 caliber ammunition.

A TRUE BILL.

/s/ [Illegible]
FOREPERSON

Date 6/25/03

PAUL I. PEREZ
United States Attorney

BY: /s/ Jeffrey F. Michelland
JEFFREY F. MICHELLAND
Assistant States Attorney
Trial Counsel

BY: /s/ Douglas Molloy
DOUGLAS MOLLOY
Assistant United States Attorney
Chief, Fort Myers Division

UNITED STATES DISTRICT COURT
Middle District of Florida
Fort Myers Division

---

THE UNITED STATES OF AMERICA

vs.

ALPHONSO JAMES, JR.

---

INDICTMENT

Violations:

Title 18, United States Code, Sections 922(g)(1) and 924(e).

A true bill,

/s/ [Illegible]
Foreperson

Filed in open court this 25th day of June, A.D. 2003.

Clerk

Bail $____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed MAY 28, 2004]

---

CASE NO. 2:03-CR-72-FTM-29DNF

---

THE UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

ALPHONSO JAMES, JR.
*Defendant.*

---

Fort Myers, Florida
April 19, 2004
10:35 a.m.

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN E. STEELE,
UNITED STATES DISTRICT JUDGE

* * * *

[3] THE COURT: I'll give you the continuance, but I want to talk about some of these issues and kind of flesh them out. The issue, as I see it, that will impact the defendant's guideline range involves the applicability of the armed career offender provision or the inapplicability, as it may be, which relates to the analysis of his prior record. The information for trafficking in cocaine, I think, is one of the convictions where there is a question as to whether it's a qualifying conviction under the armed career criminal statute.

My initial take on it, for what it's worth, is that the information properly charges trafficking in cocaine under state law because it alleges possession of, in this case, 200 grams or more, but less than 400 grams of cocaine, [sic] So, I think it does

charge trafficking. The issue is whether this charge of trafficking qualifies under the armed career criminal offender provision.

My initial reading of it would be that it does not qualify. That it's one of those trafficking alternatives that is not a controlled substance offense within the meaning of the federal statute.

The possession of cocaine charged in the indictment, I think is clear doesn't qualify. The attempted [4] burglary of a dwelling is problematic, but I think in the final analysis does qualify. There's a recent Eleventh Circuit case had that says attempted arson under the same statutory provision counted. If attempted arson counts, I see no reason why attempt to burglary doesn't.

MR. DEROVANESIAN: I had a Fifth Circuit case on point on that issue. I don't know if you wanted me to provide it.

THE COURT: Sure.

And then the last trafficking conviction, my understanding is that the information alleges trafficking by unlawfully and knowingly selling, manufacturing and delivering cocaine which clearly, to me, comes within the controlled substance offense. So when I go through the four alleged convictions, I have two of them counting and two of them not counting. And arguments, perhaps, on two of those as to whether, in your case, whether the attempted burglary counts in the government's case, whether the one trafficking counts. Those are the issues as I see them shaking loose in this particular sentencing.

* * * *

[10] THE COURT: To me, that distinguishes *Madera Madera. Madera*, of course, was Georgia statute and a different sentencing guideline but similar. So I will be looking forward to the argument as to the discussion on the Florida statute. Particularly, if you have case law saying that under the definition of a serious drug offense and it only counts—well, it doesn't necessarily have to have an element

of the intent to distribute, just that factually it has a fact pattern that involves that.

You may be right. I'm not initially convinced because my memory is that the Eleventh Circuit requires a categorical approach. When you look at the statute and look at the information and you don't look at the underlying facts, but we can get into that next time as well.

Mr. DerOvanesian, let me give you the cite to that [11] case I was talking about with the attempted arson.

MR. DEROVANESIAN: Your Honor, I'm aware of that.

THE COURT: You have that? All right.

MR. DEROVANESIAN: Yes, sir.

THE COURT: Anything else anyone wants to discuss or any other cases or cites you want to give me to take a look at?

MR. MICHELLAND: Yes, your Honor. *United States v. Demint*, an Eighth Circuit case, 74 F.3d, 876. That case specifically dealt with whether or not Florida conviction for attempted burglary falls within the definition of violent felony under the Armed Career Criminal Act. It says it did under the catchall provision. That case was decided in 1996. I have a copy for the Court.

THE COURT: Great.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed JUN 7, 2004]

---

CASE NO. 2:03-CR-72-FTM-29SPC

---

THE UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

ALPHONSO JAMES, JR.
*Defendant.*

---

Fort Myers, Florida
May 10, 2004
2:00 p.m.

---

TRANSCRIPT OF PROCEEDINGS SENTENCING
BEFORE THE HONORABLE JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

* * * *

[4] [MR. DEROVANESIAN:] Regarding the application of the guidelines, we are of the opinion that two of his prior convictions, that being the attempted burglary and one of his drug cases—we're of the opinion that neither one should be scored for purposes of making a determination of whether he's an armed career offender.

THE COURT: And which of the drug convictions?

MR. DEROVANESIAN: His 1997 case from Broward County. Looks like the state court case number is 97-11458-CF-B.

THE COURT: What paragraph is that in?

MR. DEROVANESIAN: If I may have a moment.

THE COURT: I think it looks like that's Paragraph 41. That's how I had them tracked here.

MR. DEROVANESIAN: Yes, sir. Paragraph 41.

THE COURT: And with regard to the convictions in Paragraph 39, are you counting that as one or two convictions?

MR. DEROVANESIAN: Your Honor, as far as I know, that's one.

THE COURT: All right. Well, he's got—he pled to possession of cocaine and trafficking in illegal drugs, presumably separate counts.

Let me ask Mr. Michelland.

As I counted, there's four convictions, Paragraph [5] 29 being an attempted burglary of a dwelling; Paragraph 39, one being for possession of cocaine and the second for trafficking illegal drugs; and then, finally, Paragraph 41, trafficking in cocaine.

Which of those four do you suggest are countable for the enhancement for the armed career criminal?

MR. MICHELLAND: Are you addressing me, Your Honor?

THE COURT: Yes, sir.

MR. MICHELLAND: Your Honor, I believe that the attempted burglary is countable, Paragraph 29. I believe that the trafficking in illegal drugs in Paragraph 39 is countable, which would be Count Number 2; and I believe that the trafficking cocaine, 200 to 400 grams, is countable in Paragraph 41.

THE COURT: All right. So you would concede then that the possession of cocaine in Paragraph 39 is not countable?

MR. MICHELLAND: I would concede that. I believe that's simple possession and would not qualify under the statute.

THE COURT: All right. I would agree with that.

All right. Mr. DerOvanesian, let me hear your arguments then with regard to the two that you challenge, that is, Paragraph 29 and Paragraph 41.

[6] Mr. James, if you wish, you may have a seat.

MR. DEROVANESIAN: Your Honor, regarding Paragraph 29, the attempted burglary, our position falls in line with United States versus Martinez, a Fifth Circuit case out of 1992. And we would argue to the Court that under Florida law an attempted burglary just does not present the same danger or degree of danger as presented by a burglary and it's not specifically listed as an offense with any definitions under 924(e), and we would ask the Court to so find.

In U.S. versus Martinez, the analysis was for an offense under Texas law; but in analyzing Florida law, which is under 810.02 and the sections regarding attempt, our position is that it's essentially the same as the result under Texas law.

They noted that under Texas law attempted burglary did not require entering or remaining in a dwelling to violate the statute. Our position is that the Florida law is the same.

In Florida the courts have defined attempted burglary as essentially a defendant doing some act towards the commission of a crime of burglary. It goes beyond some—it goes beyond just thinking or talking about it. And, two, a requirement that the defendant would have committed the crime except for someone preventing him from [7] doing it or the act failed.

Those definitions are found in Jones versus State, and it's at 608 So.2d 797, showing it's a Florida Supreme court case from 1992.

And our position is that attempted burglary of a dwelling—or, excuse he, attempted burglary is not a qualifying offense under 924(e) based upon those authorities.

THE COURT: Well, what do you do with the Eighth Circuit case that last time we were here Mr. Michelland cited that—DeMint, which was 74 F.3d 876, that held that the Florida attempted burglary conviction in that case did qualify as a violent offense under 924(e)?

MR. DEROVANESIAN: Your Honor, regarding DeMint, I would argue that—well, there's obviously a conflict. Our circuit is more closely in line with the Fifth and would argue that the Fifth is the correct analysis and that you should rule under the ruling or the analysis maintained by the Fifth.

The other thing that's interesting about DeMint is that, if I'm looking at it correctly, it looks like under DeMint they are finding that attempted burglary is not burglary under the definitions of 924(e), but that they find that it somehow fits into the catchall provision, which is also an interesting twist on it. Martinez, the Fifth [8] Circuit, believed that it didn't fit under either.

Looking at the way the attempted burglary is charged and going to the charging document, I would argue that the Court in Martinez took the correct approach. I don't believe that either looking at the Florida statute or the charging document is sufficient in this case to either bring it under burglary or bring it under the catchall provision, and I would argue that the Fifth Circuit's analysis and ruling is the correct one.

THE COURT: It also appears to be the minority one.

In 1998 there's a case called U.S. versus Collins, which is 150 F.3d 668, a Seventh Circuit case that collected the

decisions at that point in time; and the Seventh Circuit joined what it said was six other circuits in holding that attempted burglary was a violent crime, but it noted that three circuits held to the contrary. So at least in 1998, the split was seven-three. None of the others other than DeMint dealt with Florida, but that seemed to the split back then.

Mr. Michelland, how do you get attempted burglary to count as a violent felony?

MR. MICHELLAND: Your Honor, there are actually two issues here. I guess we don't need to get to the one if—if under 924(e) these convictions qualify, then we [9] don't need to get to the guideline itself under 4B1.—2K2.1 and 4B1.2 and 1, because then the question would be do they still count under 2B2.1. But under the armed career criminal act, the guideline application actually says that the term violent felony and serious drug offense in 924(e)(2) are not identical to the definitions of crimes of violence and controlled substance offense in 4B1.1.

But the term violent felony means any crime punishable by imprisonment for a term exceeding one year; that as an element, the use, attempted use or threatened use of physical force against the person of another is burglary or some of the other enumerated offenses, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

In United States versus Rainey, the Eleventh Circuit said and held as a matter of first impression that attempted arson should be considered a violent felony under 18 U.S.C. 924(e). That decision supports my analogy, a finding that attempted burglary would fall under the enumerated offenses or at least be—qualify as conduct that presents a serious potential risk of physical injury to another.

You go into a house and commit a burglary, obviously, there is a serious risk that someone's going to be there. If you attempt to do so, that risk doesn't [10] go away. The risk is

still there if you attempt to go in and commit the burglary but for some reason aren't successful. You don't know how someone's going to respond. They may even see you outside trying get in and they may respond and use physical force either against the perpetrator which would cause the perpetrator to use physical force against the person responding.

So I think the DeMint case is really on point here. It addresses the attempted burglary statute, and if you couple that with Rainey—and I'm not going to go through the analysis under DeMint because the Court's read it, but I'm just basically arguing that under attempt in the Florida statute it says, "A person who attempts to commit an offense prohibited by law and in such attempt does any act towards the commission of such offense but fails in the perpetration or is intercepted or prevented in the execution thereof commits the offense of criminal attempt."

So obviously if the defendant here had been convicted of attempt to commit burglary, he committed some act towards the commission of such offense and in committing such an act he presented a serious potential risk of physical injury to another. And that's essentially I think what DeMint is saying.

THE COURT: I think you're right that that's what [11] DeMint is saying. I'm not sure they got it right.

DeMint says, as I read it, that under Florida law the attempt statute punishes only conduct with severe potential risk of physical injury to another. I'm not sure that's correct. I'm not sure if Florida law is so limited.

You just read the attempt statute in Florida law and it talks about any act. It doesn't say any act that has a severe potential for physical risk of injury to another. But that's the gloss that DeMint seemed to put on the Florida statute.

MR. MICHELLAND: Well, it says, "Who attempts to commit an offense and in attempting to do so commits an act

towards the commission of the offense." So not only do you commit an act towards the commission of the offense, you have to actually attempt to commit the offense. You have to do—I don't know what the facts would be, if there's a lot of fact scenarios where you would attempt.

If you simply buy burglary tools, I don't think that's going to be enough. You have to look at the elements of the offense and then determine whether someone factually has done something in furtherance of those elements.

So it's entering or attempting to enter into a structure with the intent to commit a felony therein. You've got to attempt to go into the structure. I can't imagine that you would be charged with attempting to commit [12] a burglary if you're sitting in your car and you have burglary tools. I just—I don't know. It seems that it's not—there's not a sufficient nexus for an attempt.

But even if you disregard DeMint and you look at the Rainey case, it basically says if you attempt to commit an arson. And what's the difference between attempting to commit an arson and attempting to commit any other crime? I think the argument there is you attempt to commit any of the enumerated crimes, and in this case burglary is an enumerated crime—I think you can look at it in two different ways. You can look at it from the DeMint viewpoint or you can look at it from the Rainey viewpoint; and they're looking at it from two different ways.

And I think attempted burglary would fall within either of those analyses because clearly burglary is—there's been no argument that burglary—Florida burglary statute does not fall within 924(e). And if that is the argument, I mean the Taylor case pretty much addresses that and there's other cases that address that.

So it doesn't say it has to be burglary of a dwelling or a structure. It simply says burglary. And so clearly the crime of

burglary falls within 924(e), and Rainey says an attempt to commit such a crime satisfies 924(e) because it's one of the enumerated felonies. And it says, "Attempt like conspiracy presents a potential risk [13] of physical injury to another because attempted arson presents a serious potential risk of injury to another person. we hold that 924(e)"—and I don't think they're looking at—and the Rainey case actually deals with Florida—the Florida arson statute, and I'm assuming that they're looking at the same attempt statute that we are here, 777.04, which is the same—they're looking at the same attempt statute. And if they're reviewing the same attempt statute, they're looking at the same language. And if the Court is concerned about that language where an attempt could be something other than what the DeMint serious risk of potential risk of physical injury to another, well, Rainey pretty much covers that by saying the Florida arson—the Florida attempt statute does present—even though it involves arson, it still presents a serious physical risk of injury to another.

THE COURT: All right. Mr. DerOvanesian, why doesn't Rainey control or at least be strongly persuasive?

MR. DEROVANESIAN: Your Honor, in response to Mr. Michelland's argument and the Court's question, Mr. Michelland seems to go to this attempt language and try and weave it in and define to the Court what attempted burglary is all about.

You don't need to do that. The Florida Supreme Court has defined attempted burglary in the Jones case, as [14] I've argued previously. And what's interesting is the definition that the Supreme Court gives to attempted burglary is consistent with what you confronted Mr. Michelland with when you asked him questions regarding it.

The Florida Supreme Court says attempted burglary is nothing more than just the bare intent to commit a burglary and some overt act directed towards its commission.

Quite frankly when I stood up here, I was going to argue that if Mr. James intended to commit a burglary and bought a flashlight to help him in the commission of the crime, then technically he'd be in violation of the law. Mr. Michelland seems to impute more to it. Mr. Michelland seems to be arguing to the Court that you would need some type of attempted entry or more in order to commit the crime of attempted burglary. That is not what the law says.

And, again, we would argue that Jones versus State at 608 So.2d 797 defines it. You don't need to take the burglary statute and the attempt statute and try and combine them, the Supreme Court's done that. And their analysis is consistent with the Court's analysis and contrary to Mr. Michelland's.

Mr. Michelland told the Court that buying burglary tools in his opinion would not qualify under his analysis of attempted burglary in Florida. I submit that it would. And if you look at the definition, I would argue to the [15] Court that Mr. Michelland's wrong about that.

In DeMint, to the extent that it implies that there is some type of violent nature to all attempted burglaries, I would submit it is way off base as well.

Going directly to the Court's question regarding Rainey, the difficulty I have with Rainey is that it looks like the Court relied very heavily on their prior decisions, those being in the Wilkerson case and Mendoza-Cecelia. It looked like what they did was the Eleventh Circuit has already very carefully considered the issues of robbery and attempted robbery and they sorted all the issues out regarding that in the Wilkerson case; and Mendoza-Cecelia, they have done that as far as arson.

The difficulty I have is that attempted burglary is something altogether different. You don't have a situation such as these where you're dealing with robbery and arson, which I would submit to the Court by their very nature are far more serious inherently and generally tend to involve a victim more directly, and it's inherent in the nature of those offenses. Burglary does not. Breaking into someone's home when no one's home or attempting to do that or anything along those lines I would argue to the Court is inherently far less of a serious offense than either of these two.

I think when you look at Rainey there's very [16] little analysis by the Court and it looks like they're just really relying heavily on their analysis in these prior cases, and neither one of them involved the attempted burglary statute.

I would argue that this case is distinguished and based on the authorities that we have cited—if you look at everything that I've argued, I submit that it really does bring you back to the analysis that the Fifth Circuit did in Martinez, and I argue that based on Florida law it is the more correct approach. That's the one we would ask the Court to consider.

THE COURT: All right. Mr. Michelland, what about Jones?

MR. MICHELLAND: Your Honor, I haven't received a copy of Jones from Mr. DerOvanesian. This is the first I've heard of Jones. I don't think the Court cited Jones previously.

THE COURT: No.

MR. MICHELLAND: I was—I provided Mr. DerOvanesian with my case law. However, I have not had a copy of Martinez or Jones, so I don't know what he's talking about. I haven't been able to analyze those cases. I don't know if the Court's had an opportunity to.

THE COURT: But do you know if what he's telling me is true or does it matter?

[17] MR. MICHELLAND: I don't know, Your Honor. All I can say is it doesn't matter whether one crime, arson, is more serious than burglary. Obviously, Congress decided that burglary is serious enough to be considered a violent crime and that's all the Court needs to look at, whether it's a violent crime, not whether it's more serious in the hierarchy of things. Terroristic acts are more serious than burglary or than some of these other offenses, but they're all serious enough to qualify.

As to the other argument on Martinez, I haven't read it, I don't know whether it deals specifically with 924(e) or whether it deals with the guideline.

Mr. DerOvanesian, do you have a copy?

MR. DEROVANESIAN: Sure.

MR. MICHELLAND: Can I have a second, Your Honor?

THE COURT: Sure. I think he cited it last time because I think he gave me a copy of his case. Somebody gave me a copy of Martinez.

MR. MICHELLAND: Your Honor, all I remember is him saying it was a—I think he said a Fifth Circuit case, but he never gave—I don't remember him citing it. I didn't write it down. He may have.

THE COURT: You may be right. Somebody gave me Martinez and I have to assume it was Mr. DerOvanesian.

MR. MICHELLAND: This is Jones.

[18] Your Honor, the Jones case says, "The attempt of—the offense of attempted burglary or the intent to commit burglary and some overt act directed towards its commission." The DeMint case actually says the Florida courts have interpreted the attempt statute to require more than essentially any act. They say that it's an intent—"Intent to commit burglary and any overt act reasonably calculated to

accomplish the commission of the offense intended, going beyond mere preparation but falling short of accomplishing the crime intended."

THE COURT: The problem is they cite very old Florida District Court of Appeals cases, all of which were decided before the Jones case by the Florida Supreme Court.

MR. MICHELLAND: Well, the Jones case says, "Some overt act directed towards its commission." But, again, the Jones—the Jones case seems to say that—again, I just—I'm trying to read it so quickly.

Now, they're distinguishing between whether or not there would be double jeopardy for attempted burglary and possession of burglary tools; and the Court said that there was a distinction and they used the case of Thomas—I'm trying to find it—and I'll just read it real quick. I can't find the cite for it. It's in there somewhere, the cite is.

They say, "A distinction between the overt acts [19] necessary to commit the two crimes as illustrated by the facts in Thomas. In that case a confidential informant had advised the police that the defendant had committed a number of burglaries in a particular neighborhood. During surveillance in the area, the police arrested the defendant after seeing him jump over a fence and try to run away. At that time he was wearing a pair of socks over his hands and carrying a screwdriver.

"He admitted that he had entered the neighborhood to commit a burglary, but said he had been arrested before being able to perpetrate the crime. We concluded that there was sufficient overt activity to convict of possession of burglary tools; however, based on these facts it is obvious that Thomas could not have been convicted of attempted burglary because there had been no overt act directed towards entering or remaining in a structure or conveyance."

I think that covers the argument that I made about possession of burglary tools.

THE COURT: Mr. DerOvanesian, anything else?

MR. DEROVANESIAN: Just the purpose of the Jones case was to show what the definition of attempted burglary was. I don't know how Mr. Michelland believes he's made some point referring to some underlying case that is mentioned in reference. But the definition stands. That's what the Florida Supreme Court says attempted burglary is; [20] and I submit to the Court that based on the statute that we have before you, it just does not meet the criteria. I ask the Court to so find.

MR. MICHELLAND: Your Honor, I would proffer to the Court the Jones case.

THE COURT: Sure.

MR. MICHELLAND: It's on the last page of the opinion that I was addressing.

THE COURT: All right. The issue is whether the defendant's conviction for the attempted burglary of a dwelling constitutes a violent felony within the meaning of Section 924(e). It is clear that the Florida burglary statute does satisfy 924(e) when analyzed under the case of Taylor versus the United States, which is 495 United States 575, a 1990 case; and there's been no argument to the contrary there. The only issue is whether an attempted burglary is a qualifying felony conviction.

I do have concerns about whether the DeMint case got it right. I'm frankly not sure that the Florida attempt statute punishes only conduct with a severe potential risk of physical injury to another.

However, I don't think there's any way of distinguishing the Florida attempted burglary statute from the Rainey decision. The issue in Rainey was whether an attempt to commit an enumerated felony under 924(e) [21] constituted a

violent felony. In that case the attempt was arson and the Eleventh Circuit said it was a violent felony. It relied, as we noted, on some prior cases.

Burglary is an enumerated felony. Burglary is—seems to be no less serious than the other offenses set forth; and I presume Congress grouped those offenses because they decided that burglary was similar to arson, extortion and offenses involving the use of explosives.

It seems to me that the Eleventh Circuit has essentially spoken; that if you have an attempt to commit an enumerated felony, that is a violent felony, so the Court is going to overrule the defendant's objection and the Court does hold that the attempted burglary of the occupied dwelling set forth in Paragraph 29 is a qualifying offense under the armed reoffender statute.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

[Filed MAY 18, 2004]

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Case Number: 2:03-CR-72-FTM-29SPC
USM Number: 33689-018

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UNITED STATES OF AMERICA

-vs-

ALPHONSO JAMES, JR.

---

Martin DerOvanesian, FPD
2110 First Street, Suite 2-146
Fort Myers, FL 33901

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AMENDED JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18 U.S.C. § 922 (g)(1) | Felon in Possession of a Firearm | January 31, 2003 | One |

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
May 10, 2004
First Amended: May 18, 2004

/s/ John E. Steele
JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

May 18, 2004

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 71 Months.

The Court recommends to the Bureau of Prisons:

1. Participation in 500 hour drug treatment program, if and when eligible.

2. Incarceration as close to home as possible, it not inconsistent with drug treatment.

The defendant is remanded to the custody of the United States Marshal.

## RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall participate as directed in a program (outpatient and/or inpatient) approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

| Total Assessment | Total Fine | Total Restitution |
|---|---|---|
| $100.00 | Waived | NA |

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Special assessment of $100.00 due immediately

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

FILE COPY

Date Printed: 05/19/2004

Notice sent to: All parties &

Jeffrey Michelland, Esq.
U.S. Attorney's Office
Middle District of Florida
U.S. Courthouse
2110 First St., Room 3-137
Ft. Myers, FL 33901

2:03-cr-00072 sll

Martin Der Ovanesian, Esq.
Federal Public Defender's Office
Federal Bldg., Suite 2-146
2110 First St.
Ft. Myers, FL 33901

2:03-cr-00072 sll

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-12915

UNITED STATES OF AMERICA,
*Plaintiff-Appellant-Cross-Appellee,*

v.

ALPHONSO JAMES, JR.,
*Defendant-Appellee-Cross-Appellant.*

Nov. 17, 2005

Appeals from the United States District Court
for the Middle District of Florida

Before BLACK, WILSON and COX, *Circuit Judges.*

WILSON, *Circuit Judge:*

This appeal addresses whether certain Florida state convictions qualify as predicate felony convictions under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Alphonso James, Jr. was indicted for possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court found that two of James's previous felony convictions qualified as predicate convictions under the ACCA, but rejected a third conviction, and therefore, did not enhance James's sentence under the ACCA. The United States ("the Government") appeals the district court's ruling. James cross-appeals, challenging the district court's decision to count one of his previous convictions as a qualifying felony under the ACCA. James also argues that § 922(g) is unconstitutional.

We hold that the district court erred when it held that James's Florida conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine was not a predicate conviction under the ACCA. We therefore vacate the sentence imposed and remand, directing the district court to sentence James in accordance with the ACCA.

## I. BACKGROUND

In June of 2003, the Government charged James with possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). James pled guilty as charged.

The Government sought to have James's sentence enhanced under the ACCA, 18 U.S.C. § 924(e). The ACCA provides a mandatory minimum term of imprisonment of 15 years for any person who violates 18 U.S.C. § 922(g) after three convictions in either federal or state court for a "violent felony" or "serious drug offense." *See* § 924(e). In 1997, James was convicted in a Florida state court of attempted burglary of a dwelling, in violation of Florida Statute §§ 810.02 and 777.04. In 1998, James was convicted in Florida state court of trafficking in illegal drugs in violation of Florida Statute § 893.135. Later that year, James was again convicted in Florida state court under the same statute for trafficking in cocaine by possession of between 200 and 400 grams of cocaine. Based on James's three prior felony convictions, the probation officer recommended that James be sentenced as an armed career criminal under the ACCA.

At sentencing, James objected, arguing that neither his attempted burglary conviction, nor his trafficking by possession conviction, should count as a predicate conviction under the ACCA. The district court concluded that James's attempted burglary conviction was a "violent felony" under § 924(e)(2)(B) of the ACCA. The district court also concluded, however, that James's trafficking by possession

conviction did not qualify as a "serious drug offense" under § 924(e)(2)(A) of the ACCA, reasoning that the Florida statute under which James was convicted did not include as an element of proof that James had intended to distribute his 200 to 400 grams of cocaine. Therefore, the district court refused to enhance James's sentence under the ACCA because he did not qualify as an armed career criminal, as he had only two predicate convictions. The district court sentenced James to 71 months' imprisonment, followed by 36 months' supervised release.

The Government now appeals the district court's decision not to count James's trafficking by possession conviction as a "serious drug offense" for purposes of sentencing him under the ACCA. James cross-appeals, challenging the district court's decision to count his attempted burglary conviction as a "violent felony." James further argues that § 922(g) is unconstitutional either facially, or as applied to him, because it exceeds Congress's authority under the Commerce Clause.

## II. DISCUSSION

There are two issues on appeal:[1] (1) whether the district court erred by failing to count James's conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA; and (2) whether the district court erred by counting James's conviction for attempted burglary of a dwelling as a "violent felony" under the same statute. We review *de novo* whether a conviction is a "violent felony" or a "serious drug offense" within the meaning of § 924(e). *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir.2002) (per curiam).

---

[1] James raises his argument that § 922(g) is unconstitutional for the first time on appeal. "This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir.2004) (internal quotations omitted). Therefore, James has failed to preserve this claim, and we will not address it.

A. Whether Trafficking in Cocaine by Possession of between 200 and 400 Grams of Cocaine is a "Serious Drug Offense"

The Government argues that the district court erred by failing to count James's Florida state conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA. The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . , for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii).

The Florida Statute under which James was convicted, section 893.135(1)(b)(1)(b), reads as follows:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in § 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine,". . . . If the quantity involved:
>
> . . .
>
> b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

The district court concluded that the statute did not satisfy the ACCA's requirement that the offense involve the "intent to manufacture or distribute," § 924(e)(2)(A)(ii), because the Florida statute does not have "as an element" of the offense an intent to manufacture or distribute.

On appeal, the Government argues that Congress defined a "serious drug offense" under the ACCA to include any state

offense "involving" the intent to distribute, not only those offenses having "as an element" such intent. In support, the Government cites *United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir.2003), *cert. denied*, 540 U.S. 1026, 124 S.Ct. 589, 157 L.Ed.2d 447 (2003), in which we rejected the district court's reasoning in an analogous context. In *Madera-Madera*, the defendant committed a prior offense of possession of 87 grams of methamphetamine, a violation of a Georgia law prohibiting the possession of 28 grams or more of the drug. *Id.* at 1231. We had to determine whether such an offense qualified as a "drug trafficking offense" for purposes of enhancement under the Sentencing Guidelines. *Id.* Although Georgia law expressly designated the defendant's offense as drug "trafficking," the defendant argued that the offense should not be considered a trafficking offense under the Sentencing Guidelines because he merely possessed the drugs. *Id.* We rejected this argument for several reasons. *Id.*

We explained that Georgia enacted a three-tiered scheme for punishing drug crimes: (1) possession of any amount; (2) possession with the intent to distribute any amount; and (3) "trafficking" by possession of more than 28 grams. *Id.* Further, we concluded that such a scheme necessarily recognizes that someone who is convicted of drug trafficking, the offense to which the defendant pled guilty, "plans on distributing and thereby 'trafficking' those drugs. In making possession of 28 grams of methamphetamine a 'trafficking' offense, Georgia's trafficking statute necessarily infers an intent to distribute once a defendant possess a certain amount of drugs." *Id.* at 1232. The Government here argues that Florida has nearly an identical three-tiered scheme, and therefore, we should apply our reasoning in *Madera-Madera* to hold that Florida's drug trafficking statute also infers an intent to distribute.

In response, James relies on *Gibbs v. State*, 698 So.2d 1206 (Fla.1997), a case that the district court referenced when making its ruling. In *Gibbs*, the Florida Supreme Court held

that Florida convictions for both simple possession of cocaine and drug trafficking by possession of cocaine based on the same conduct violated the Double Jeopardy Clause because none of the elements of the drug trafficking statute differed from the elements of the simple possession statute. *Id.* at 1208-10. James argues that this case indicates that drug trafficking by possession in Florida does not involve the intent to manufacture or distribute.

In determining whether a particular offense is a "serious drug offense" under the ACCA, sentencing courts adopt a categorical approach, looking only to the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *See Taylor v. United States*, 495 U.S. 575, 600-02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); *see also, Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005). The definition of a qualifying state offense under the ACCA is a matter of federal law. *Taylor*, 495 U.S. at 590-91, 110 S.Ct. 2143.

Florida, like Georgia, has a three-tiered scheme for punishing drug-related offenses. Under Florida law, those three tiers are the following: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a); (2) possession with intent to distribute a controlled substance, § 893.13(1)(a); and (3) trafficking in cocaine by possession of 28 grams or more of the drug, § 893.135(1)(b). Under this third tier, trafficking in cocaine is further delineated according to the amount of drugs that the defendant possessed, and the sentence imposed increases accordingly. *See id.* James was convicted under this third tier for possession of between 200 and 400 grams of cocaine. Fla. Stat. § 893.135(1)(b)(1)(b).

Florida's three-tiered system for punishing drug crimes is nearly identical to Georgia's three-tiered scheme. Although *Madera-Madera* involved Georgia law, we see no reason to distinguish *Madera-Madera* from this appeal. We hold that Florida's drug trafficking statute also "infers an intent to

distribute once a defendant possesses a certain amount of drugs." *Madera-Madera*, 333 F.3d at 1232. In both Florida and Georgia, the defendant must be in possession of a significant quantity of drugs, namely 28 grams, before the state deems the offense to be "trafficking." Moreover, under both the Georgia and Florida schemes, drug trafficking is a more serious offense, and is punished more harshly, than either simple possession or possession with intent to distribute. *See Gibbs*, 698 So.2d at 1209 ("[T]he legislature intended that trafficking possession, which requires the possession of more than twenty-eight grams of cocaine, be punished more harshly than simple possession, which merely requires the possession of less than twenty-eight grams of any illegal drug."). Florida's three-tiered scheme for punishing drug crimes is not materially distinguishable from Georgia's, and therefore, our reasoning in *Madera-Madera* controls this case. Accordingly, Florida's drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more.

Furthermore, it is not necessary that the Florida statute under which James was convicted include as an element of the offense an intent to manufacture or distribute cocaine in order for James to be sentenced under the ACCA, as the district court ruled. The language of the Florida statute need not exactly match the ACCA's definition of a "serious drug offense." *See Madera-Madera*, 333 F.3d at 1233 (explaining that the wording of the Georgia statute need not exactly match the wording of the Sentencing Guidelines because the Sentencing Commission did not define drug trafficking by its elements, but rather by the type of conduct prohibited). Rather, the question is whether the Florida statute falls within the ACCA's definition of a "serious drug offense." The definition broadly includes any offense "involving" the manufacture, distribution, or possession with intent to manufacture or distribute. 18 U.S.C. § 924(e)(2)(A)(ii). This "involving" language makes clear that the term "serious drug offense"

may include even those state offenses that do not have as an element the manufacture, distribution, or possession of drugs with intent to manufacture or distribute. Therefore, the Florida statute falls within the broad definition of a "serious drug offense."

Finally, James was convicted of trafficking, the most serious drug offense in Florida. To hold that this conviction does not qualify as a "serious drug offense" for purposes of the ACCA enhancement would create an anomaly. *See Madera-Madera*, 333 F.3d at 1233-34 (discussing the potential anomalous result if the defendant's trafficking offense did not qualify for enhancement under the Sentencing Guidelines). If James had been convicted in Florida of a lesser offense, such as possession with intent to distribute, he would qualify for enhanced sentencing under the ACCA. However, as the case stands now, James would not qualify for such enhanced sentencing because the Government charged James with—and James pled guilty to—a more serious trafficking offense. The district court recognized this anomaly at sentencing noting that, under its ruling, James's plea to a greater offense had ensured that he would be treated more—not less—leniently under the ACCA. Such an anomalous result would thwart the ACCA's purpose. *See United States v. Pope*, 132 F.3d 684, 691 (11th Cir.1998) (noting that the ACCA was intended to provide additional punishment for habitual offenders who Congress found to be responsible for the disproportionate number of violent crimes).

Here, James pled guilty to trafficking in cocaine by possession of between 200 and 400 grams of the drug. Florida's three-tiered scheme recognizes that someone who is in possession of between 200 and 400 grams of cocaine intends to manufacture and distribute, and thereby, "traffic" those drugs. Moreover, federal law permits an inference of intent to distribute from a defendant's possession of a significantly large quantity of drugs. *See United States v. Bain*, 736 F.2d

1480, 1486 (11th Cir.1984). *Gibbs v. State*, 698 So.2d 1206, does not require a contrary result because interpretation of the term "serious drug offense" is a matter of federal law as determined by the federal courts. *See Taylor*, 495 U.S. at 590-91. Accordingly, James's conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine falls within the ACCA's definition of a "serious drug offense."

We hold that the district court erred when it found that James's conviction for trafficking in cocaine by possession was not a qualifying conviction under the ACCA. We further find below that the district court did not err when it held that James's conviction for attempted burglary is a qualifying conviction. Therefore, because James has three qualifying felony convictions, we vacate and remand, directing the district court to sentence James in accordance with the ACCA.

B. Whether Attempted Burglary of a Dwelling is a "Violent Felony"

James argues on cross-appeal that his Florida state conviction for attempted burglary is not a "violent felony" under § 924(e), and therefore, that the district court erred in counting that conviction as a qualifying conviction under the ACCA. The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

On appeal, James asserts that, under Florida law, attempted burglary does not fall within the definition of a "violent felony" because it does not pose a serious potential risk of physical injury to another. Instead, he argues, attempted

burglary poses merely "a risk of a risk." *United States v. Weekley*, 24 F.3d 1125, 1125 (9th Cir.1994).

In response, the Government relies on our precedent in *United States v. Wilkerson*, 286 F.3d at 1326 (quoting § 924(e)(2)(B)(ii), in which we established that an incohate crime qualified as a violent felony when its object involved conduct that "present[ed] a serious potential risk of physical injury to another.") In *Wilkerson*, we held that a conviction for conspiracy to commit robbery in violation of Florida law qualified as a "violent felony." *Id.* First, we reasoned that robbery itself was a "violent felony" under § 924(e)(2)(B) because it presented a serious risk of physical injury to another. *Id.* at 1325. We further reasoned that "a conspiracy that has as its object the offense of robbery likewise presents such a risk." *Id.* We noted that "[w]hen one reaches an agreement with a co-conspirator to commit a robbery, and formulates the intent to commit the robbery, his conduct presents at least a potential risk of physical injury within the meaning of § 924(e)(2)(B)(ii)." *Id.* at 1325-26.

Likewise, the Government cites *United States v. Rainey*, 362 F.3d 733 (11th Cir.2004) (per curiam), *cert. denied*, 541 U.S. 1081, 124 S.Ct. 2433, 158 L.Ed.2d 996 (2004), the case upon which the district court based its decision. In *Rainey*, we relied on *Wilkerson* to hold that a conviction for attempted arson under Florida law qualified as a "violent felony" under § 924(e)(2)(B)(ii). *Rainey*, 362 F.3d at 736. In *Rainey*, we noted that we had not previously decided whether an attempt to commit an enumerated felony under § 924(e) constituted a "violent felony." *Id.* at 735. However, following our reasoning in *Wilkerson*, we held that "[a]ttempt, like conspiracy, presents the potential risk of physical injury to another. Because attempted arson presents a serious potential risk of injury to another, we [held] that the district court correctly concluded that it [was] a violent felony under § 924(e)." *Id.* at 736. Moreover, in *United States v. Gunn*, 369 F.3d 1229,

1238 (11th Cir.2004) (per curiam), *cert. denied, Cantillo v. United States*, 543 U.S. 937, 125 S.Ct. 324, 160 L.Ed.2d 244 (2004), we held that attempted burglary is a "crime of violence" for purposes of United States Sentencing Guidelines Manual § 4B1.1(a)(2), reasoning that "[a]ttempted burglary presents a serious potential risk of physical injury to another. An uncompleted burglary does not diminish the potential risk of physical injury."

Relying on our precedent in *Wilkerson* and *Rainey*, we affirm the district court's ruling and hold that attempted burglary under Florida law is a "violent felony" under § 924(e)(2)(B). The district court ruled that, because burglary is an enumerated felony under § 924(e)(2)(B)(ii), and because under *Rainey* an attempt to commit an enumerated felony under § 924(e)(2)(B)(ii) constitutes a "violent felony," attempted burglary is also a "violent felony." We agree. We reject James's argument that attempted burglary merely poses "a risk of a risk" and instead hold that an attempt to commit burglary, like an attempt to commit arson, presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a "violent felony."

## III. CONCLUSION

For the above reasons, we vacate James's sentence and remand, directing the district court to sentence James in accordance with the ACCA.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

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Case Number: 2:03-CR-72-FtM-29SPC
USM Number: 33689-018

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UNITED STATES OF AMERICA

-vs-

ALPHONSO JAMES, JR.

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Martin DerOvanesian, FPD
2110 First Street, Suite 2-146
Fort Myers, FL. 33901

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JUDGMENT UPON REMAND IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18 U.S.C. §§ 922(g)(1) and 924(e) | Felon in Possession of a Firearm | January 31, 2003 | One |

The defendant is re-sentenced following remand from the Eleventh Circuit as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by *United States v. Booker*, 125 S. Ct. 738 (2005).

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
May 11, 2004
First Amended: May 18, 2004
Date of Re-Sentence: March 27, 2006

/s/ John E. Steele
JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

March 28, 2006

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 180 Months.

The Court recommends to the Bureau of Prisons:

1. Participation in the 500 Hour Intensive Drug Treatment Program.

2. That the defendant be returned to his original institution; that being Coleman Florida.

The defendant is remanded to the custody of the United States Marshal.

## RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) years. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Burçau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall participate in a program (outpatient and/or inpatient) approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency and shall follow the Probation Officer's instructions regarding the implementation of this condition. This program may include testing for the detection of substance use or abuse not to exceed 104 tests per year. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Office's sliding scale for Substance Abuse Treatment Services. Upon completion of a drug or alcohol dependency treatment program the defendant is directed to submit to testing for the detection of substance use or abuse not to exceed 104 times per year.

2. Having been convicted of a qualifying felony offense, the defendant shall cooperate with the probation office in

the collection of DNA, if not collected by the Bureau of Prisons.

3. The defendant shall refrain from any unlawful use of a controlled substance, and shall submit to one drug test within 15 days of placement on supervised release and at least two periodic drug tests thereafter as directed by the probation officer. Based on the Court's determination that additional drug urinalysis is necessary, the Court authorizes random drug testing not to exceed 104 tests per year.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

| Total Assessment | Total Fine | Total Restitution |
|---|---|---|
| $100.00 (if not previously paid) | Waived | N/A |

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.